Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Petition of Revolution Messaging for an Expedited Clarification and Declaratory Ruling	CG Docket No. 02-278

Reply to the Comments of ccAdvertising Opposing Revolution Messaging's Petition

Like many other files on this docket, ccAdvertising's comments confuse the floor with the ceiling.

The TCPA broadly addresses several specific practices under the subsection 227(b) titled "Restrictions on use of automated telephone equipment." Within the statute itself, Congress directly prohibited certain acts using such "automated telephone equipment." Congress defined some, but not all, devices that fall within that term. While Congress directly prohibited some acts, it also empowered the Commission to enact rules to further the goals of the statute. Congress provided a private right of action both for violations of the statute, and any violations of the Commission's attendant regulations.

The "floor" in this case is one that the statute places beneath, not above, the Commission. The Commission is not authorized to permit what the statute

unambiguously prohibits. Under the guise of interpretation, the Commission is not authorized to declare an exemption for a device that unambiguously meets even the most limited interpretation of the definition of "automatic telephone dialing system" ("ATDS") in the statute.

The converse, however, is not true. The definition of ATDS in the TCPA does not impose a ceiling preventing the FCC from reaching any "automated telephone equipment" either through expansive reading of existing definitions, or by directly subjecting new "automated telephone equipment" technologies to the TCPA under the Commission's authority directly provided for in subsection 227(b).

The use of the Commission's authority to develop the contours of the scope of the TCPA is well known. For example, in 1995 the Commission adopted an unstated exception to the prohibition on the use of "automated telephone equipment" (fax machines) when the sender had an "established business relationship" ("EBR") with the recipient. Such an provision was not present in the definition of "telephone facsimile machine" or "unsolicited advertisement" and legislative history suggested that specific provision was intentionally removed from the bill before passage. Nevertheless, that exception adopted by the FCC was ultimately upheld. *CE Design Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443 (7th Cir. 2010).

Such agency interpretations are the appropriate authority "which courts and litigants may properly resort for guidance." *Olmstead v. L. C.*, 527 U.S. 581, 583 (2000). They are the authoritative and unifying source for the TCPA's application. The principal rationale underlying this principle "is that in this context the agency

acts as a congressional proxy; Congress develops the statutory framework and directs the agency to flesh out the operational details." *Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 441-42 (7th Cir. 1994), *aff'd* 516 U.S.152 (1996).

The ability of the Commission to interpret a statute and to adopt such constructions is particularly appropriate in areas of evolving technology. This truism has been demonstrated many times in the Commission's administration of the TCPA:

- Fax servers and personal computers that can receive faxes are a "telephone facsimile machine."
- Predictive dialers are an ATDS.
- Safe harbor for calls to numbers ported to cell phones. (47 C.F.R. § 64.1200(a)(1)(iv))
- Requirement for an opt-out notice on permission-based fax advertisements.
- Identification requirement that the identification in prerecorded messages "must be the name under which the entity is registered to conduct business." 64.1200(b)(1).
- Declaring a call made to ask for permission to make a subsequent solicitation, is itself a solicitation 10 FCC Rcd 12391, 12408, ¶15 (1995).
- A call that uses time from a "bucket" of minutes (or bytes, or messages) is a call for which the recipient is "charged."

None of these interpretations are found in the plain text of the TCPA itself. Absent the Commission's interpretations, none of these provisions would have been apparent to a construing court.

ccAdvertising's self-serving bifurcation of the categories of devices that send

text messages is irrelevant. Regardless of the path or topology of the message, when someone utilizes an automated device, to send multiple messages without human intervention, and is using such a device to knowingly send those messages "to any telephone number assigned to a ... cellular telephone service" then they are within the ambit of the TCPA. Whether that is accomplished by sending 10 digit destination cell phone number to a switch that then propagates the message through the PSTN or VOIP carrier, or whether it is done by sending a formatted message to a gateway with the 10 digit destination cell phone number as part of the message destination address (i.e. 555-555-1234@verizon.com) does not affect the application of the TCPA.

The important fact is that they are using the 10-digit phone number as the destination. Sending a message to "marysmith@verizon.com" is not subject to the TCPA, even if Ms. Smith has a system where such messages to that address are forwarded to her phone, because the message was not sent with the destination of a phone number contemplated as the receiving endpoint by the sender. Similarly, someone who forwards a land-line to a cell phone number does not make calls to the land line number now a violation of the rules regarding calls to a cell phone.

The Petition is not presenting a "strained" definition as ccAdvertising claims.[1] ccAdvertising appears to fixate on the portion of the definition of ATDS "to dial such numbers"[2] and then claim that "internet-to-text messaging technology does not use

[1] CcAdvertising at 10.

[2] Id.

a traditional dialing technique." As the Commission is well aware, a number of standard references are available for this term in telecommunications, including FS-1037c, American National Standard T1.523-2001, Telecom Glossary 2000. Such references show that the definitions of "dialing" are quite expansive, and in no way support the limited interpretation urged by ccAdvertising.

This would not "have the Commission define 'to dial' to mean 'to send an email'" as ccAdvertising claims. Any "automated" message (including one using e-mail for a portion of its transport) sent to a 10-digit telephone number expressly intending to use a gateway that processes the cell phone address as the destination (i.e. 555-555-1234@verizon.com) to deliver the message to the cell phone with that 10-digit phone number, is indeed "dialing."

This conclusion clearly does not prohibit "virtually every text message" — it only prohibits messages sent 1) with an automated device, 2) without meaningful human intervention, 3) to a cell phone number, and 4) which are unsolicited. All four conditions must be met under current Commission interpretations. This highlights the misunderstanding that ccAdvertising makes. It is the person who sends the message who is actually "using" the ATDS. If they are using their PC and Outlook to send mass text messages without consent of the recipients, to 10-digit cell phone numbers using a gateway, they are using the gateway no differently then if they used an SMS application or a predictive dialer application on a cell phone to bulk-send unsolicited text messages.

CAN-SPAM is not the sole regulation of text messages

The notion that CAN-SPAM is or should be the sole regulation of text messages is nonsensical. A number of statues apply to text messages including the FDCPA; Interstate Wire Act of 1961; 18 U.S.C. § 875 (interstate threats); and others. As is appropriate, the 1936 Telecommunications Act is the organic statute regulating telecommunications infrastructure and the TCPA was in large degree concerned with protection of that infrastructure in addition to protection of consumers from misuse of the infrastructure. There is no prohibition on, or even any good reason to eschew any overlap between CAN-SPAM and the TCPA.

Furthermore the differences in CAN-SPAM and the TCPA are vast. Most notably, the TCPA (and the Commission's interpretations of the portions relevant to this matter) deals with *automated* messaging—messages sent without human intervention but irregardless of content. CAN-SPAM, on the other hand, applies to even a single manually-entered and manually-dialed message, if it is commercial. CAN-SPAM excludes political text messages, but the TCPA does not.

ccAdvertising is also misinformed (or intentionally misleading) in its dismissal of text message spam using gateways to "emergency numbers such as 911." True, messages to 911@ wireless domains will (should) not result in a call to the 911 number but each 911 number may have an underlying cell number of a traditional 10-digit format that certainly can be dialed by a gateway.

ccAdvertising's First Amendment argument is frivolous

ccAdvertising's argument with respect to the First Amendment misses several important marks. Rather than bloat the record by simply pasting those comments here I ask the Commission to incorporate my comments on the GroupMe petition on this docket.

I will, however, note that the notion that a member of congress is immune from application of the TCPA is not only frivolous, but the record shows it is a non-issue. There are no examples of members of Congress disabusing the TCPA by sending junk faxes to constituents and claiming exemption as a "government entity." Nor have there been examples in the record of members of Congress disabusing the TCPA by making prerecorded calls to constituents and claiming exemption as a "government entity."

It is not just the cost

Finally, arguments on what percentage of people have "unlimited" texting plans miss the mark. It is not just the cost. Cell phones are much more intimate devices than land lines, and deserve special protection. A ringing cell phone is more intrusive, and more likely to be answered regardless of the circumstances. Cell phone messages (calls and texts) are thus more intrusive, and it is the entire platform that is regulated by the TCPA since all messages using that medium are intrusive and invasive, and more so that other means of electronic communication.

The current Commission language is adequate

The Commission's current construction of ATDS squarely fits gravamen of the original target of this portion of the TCPA—automated devices that make calls without meaningful human intervention required to dial each individual call. That is still a good—and practical—application of the Commission's interpretive authority.

Respectfully submitted,